In my judgment the notice need not be as precise as the summons; it is the summons that must be precise. The notice is merely to refresh the offender's mind as to the facts which may be the substance of a charge. Its object is to acquaint the offender promptly that he may be prosecuted so that he may be able to collect material for his defence while the matter is still fresh in his mind and that of potential witnesses; so the sooner the notice is given the better. (See *Sandland* v. *Neale* [5]).

In dealing with the particularity of the notice required under section 56(1) the words are *inter alia* "specifying the nature of the alleged offence" and not "specifying the offence" or "the particular offence". In my opinion, those words do not necessarily mean that a notice must be a notice of the particular section of the Ordinance under which the prosecution is contemplated. Nor do I held the view that at the time when that notice was given it was necessary that the police officer or other authority should have definitely made up his mind which particular charge was to be preferred. Only the "nature of the alleged offence" and not the particular offence itself need be specified.

For the above reasons, I would allow the the appeal, set aside the lower court's order of acquittal and direct that the defence be called.

Appeal allowed.

Solicitors: *Khoo & Sidhu.*

PUBLIC PROSECUTOR v. TAN KIM CHOK

[R.Cr.J. (Chang Min Tat J.) October 1, 1968]
[Ipoh — Criminal Revision No. 16 of 1968]

Criminal Law and Procedure — Sentence of whipping — Accused over 50 years of age — Criminal Procedure Code (Cap. 6), s. 289.

The accused had been sentenced to 4 months imprisonment and 2 strokes of the rattan. The accused was over 50 years of age.

Held: the sentence of whipping was in breach of section 289 of the Criminal Procedure Code and must be set aside.

CRIMINAL REVISION.

M. Mahalingam (Deputy Public Prosecutor) for the applicant.

Respondent in person.

Chang Min Tat J. (delivering oral judgment): The sentence passed on the accused in this case of four months imprisonment with effect from the date of arrest and two strokes of the rattan was brought to my notice by the trial president of the Sessions Court. Subsequent to passing the sentence the learned president realised that the sentence was in breach of section 289 of the Criminal Procedure Code. The accused was clearly a man above 50 years of age and should not be subject to any whipping by reason of his age. The order of whipping therefore cannot stand. The sentence of imprisonment as to four months from the date of his arrest was obviously arrived at because of the sentence of whipping. It is manifestly inadequate but in view of the undertaking by the accused that he would not molest his wife in future, I shall not increase the sentence except to make it run from the date of conviction.

Order accordingly.

PUBLIC PROSECUTOR v. YUEN PENG LAM

[R.Cr.J. (Chang Min Tat J.) October 1, 1968]
[Ipoh — Criminal Revision No. 17 of 1968]

Criminal Law and Procedure — Sentence — Fines — Default sentences should run consecutively — Courts Ordinance, 1948, s. 102(c).

The learned magistrate had in imposing fines on two charges against the respondent ordered that the sentences in default of payment should run concurrently.

Held: the order was wrong and in contravention of section 102(c) of the Courts Ordinance, 1948 and therefore should be varied, so as to make the default sentences run consecutively.

CRIMINAL REVISION.

Chang Min Tat J. (delivering oral judgment): The order of the learned magistrate making the default sentences on the two charges to run concurrently is wrong and is in contravention of section 102(c) of the Courts Ordinance 1948. The learned magistrate has now referred this matter for revision. Accordingly I set aside the order of concurrency and substitute therefor an order that the default sentence run consecutively.

Order accordingly.

NASIB SINGH v. RAMASAMY

[A.C.J. (Ibrahim J.) October 5, 1968]
[K.L. — Civil Appeal No. 26 of 1967]

Practice and Procedure — Illegality — Not pleaded — Illegality brought to attention of court — Duty of court — Promissory note in English language not attested — Moneylenders Ordinance, 1951, s. 27.

Moneylenders — Promissory note — Not attested — Illegality not pleaded.

This was an appeal against the decision of the President, Sessions Court, Kuala Lumpur, dismissing the claim of the appellant for $1,870.70. The learned president found that the respondent did not under-

stand the English language in which the promissory note was written and as it was not attested it was void under the Moneylenders Ordinance, 1951.

Held, dismissing the appeal: although the illegality for failure to comply with the requirements of section 27 of the Moneylenders Ordinance, 1951 had not been pleaded, it had been brought to the attention of the court and therefore the learned president was right in dismissing the claim.

Cases referred to:—

(1) *Natar Singh* v. *Syed Abdul Rahman & Anor.* [1962] M.L.J. 265.

(2) *Scott* v. *Brown, Doering, McNab & Co.* [1892] 2 Q.B. 728.

(3) *Seven Seas Supply Co.* v. *Rajoo* [1966] 1 M.L.J. 71.

(4) *In re Arbitration between Mahmoud and Ispahani* [1921] 2 K.B. 729.

MAGISTRATE'S CIVIL APPEAL.

K.L. Devaser for the appellant.

P. Norendra for the respondent.

Cur. Adv. Vult.

Ibrahim J.: The appellant, a moneylender, brought an action in the Sessions Court, Kuala Lumpur, claiming from the respondent the sum of $1,870.70 due on an on demand promissory note executed by the respondent in his favour in the sum of $1,300 with 18% interest per annum thereon. The learned president dismissed the claim with costs. The appellant is appealing against that decision of the learned president.

The learned president found that the respondent did not understand the English language in which the promissory note (Exh: P.1) was written and that as P.1 was not attested in accordance with the requirement of section 27(1) of the Moneylenders Ordinance No. 42 of 1951 it was void and the appellant therefore was not entitled to recover the loan for which P.1 was taken as security by virtue of section 27(2) of the said Ordinance. Section 27(1) requires that:—

"The attestor shall explain the terms of the promissory note to the borrower, and shall certify thereon that the borrower appeared to understand the meaning of the same. The money borrowed shall be paid over by the lender to the borrower in the presence of the attestor who shall certify the fact upon the promissory note".

P.1 was not so certified.

Hepworth J. in *Natar Singh* v. *Syed Abdul Rahman & Anor.*[1] at page 266 said:—

"It is clear from these cases that unless a defendant raises the defence of the illegality of the contract on the pleadings then he cannot rely upon it and, except where the contract is on the face of it illegal or its illegality is brought to the notice of the court, even the court has no right to intervene".

P.1's illegality was not specifically raised in the pleading and the main grounds of appeal are directed against the learned president's finding that "not only the statement of defence indicated the illegality indirectly, but the document was illegal on the face of it, and more important still this point was brought to the notice of the court".

The statement of defence was filed on 1st June 1965 and an amended statement of defence was filed on 18th July 1966. A further amendment was made at the commencement of the trial on 26th July 1966 and paragraph 2 of the statement of defence as finally amended reads as follows:—

"2. Regarding to paragraph 2 of the statement of claim the defendant admits taking the loan but says that he executed a blank and contends that various sums of money in cash and by cheques totalling $1,350 were paid to the plaintiff in the presence of witnesses. Defendant will also produce bank statements in support of the claim".

It is obvious from the above that P.1's illegality for failure to comply with the requirement of section 27 in respect of its attestation had not been pleaded as the respondent's statement that "he executed a blank" on which the learned president had based his decision that it was indirectly pleaded must have been made with reference not to the material requirement of section 27 but to the requirement of section 16(3) that the note or memorandum shall contain all the terms of the contract and in particular shall show separately and distinctly, among other things, the principal sum lent. The learned president therefore was wrong in holding that the statement of defence had indirectly indicated the illegality.

The learned president was also wrong when he held that P.1 was illegal on the face of it. There is nothing on the face of it to show that P.1 was illegal. It would be illegal on its face if, for instance, compound interest was charged. The fact that it also contains the signature of one K.L. Devaser does not make it *ex facie* illegal.

The learned president was however correct in holding that the illegality was brought to the notice of the court and because of that to refuse to enforce P.1 and thereby to dismiss the claim. In *Scott* v. *Brown, Doering, McNab & Co.*[2] at page 728, Lindley L.J. said:—

"No court ought to enforce an illegal contract . . . if the illegality is duly brought to the notice of the court".

P.1's illegality was first brought to the notice of the court when counsel for the respondent objected to its admission when it was tendered as an exhibit by the appellant (P.W.1) at a very early stage of the trial on the ground that it did not comply with section 27 and it clearly appeared when evidence was adduced which the learned president accepted that the

respondent did not understand the English language.

In *Seven Seas Supply Co.* v. *Rajoo* [3] it was held that:—

"As the defence of illegality was not pleaded and as all the relevant facts on this issue were not before the court, the court ought not on its initiative to refuse to enforce the contract on the ground of illegality".

It was argued on behalf of the appellant that as P.1's illegality on the ground that the respondent did not understand the English language was not raised in the pleading he had had no opportunity to produce evidence to rebut it with the result that all the relevant facts were not produced before the court and as such the learned president should not have found that the respondent did not understand the English language and thereby to refuse to enforce P.1.

As stated earlier P.1's illegality under section 27 was brought to the notice of the court at an early stage of the hearing and the appellant therefore cannot say that he had had no opportunity to produce whatever evidence that might have been available in rebuttal. Mr. K.L. Devaser (P.W.2) whose signature appears on P.1 gave evidence that he attested P.1. The attestation however was not certified on P.1 as required by section 27(1). The appellant himself said that P.1 was explained to respondent in Malay by his lawyer, P.W.2. Respondent was thoroughly cross-examined as to whether or not he knew the English language and evidence was also adduced that respondent had not only signed P.1 but also his retainer in English and that he could understand figures. All these show that all the relevant and available facts relating to this matter had been brought before the court and the learned president was therefore correct in finding that the respondent did not understand written English and that P.1 was therefore illegal and void.

The respondent not only admitted that he had taken the loan but also said that he had made various payments towards it and it was argued on behalf of the appellant that this subsequent conduct of the respondent should preclude or estop him from relying on the illegality. There is no merit in this argument. In *In re an Arbitration between Mahmoud and Ispahani* [4] at page 729 Scrutton L.J. said:—

"In my view the court is bound, once it knows that the contract is illegal, itself to take the objection and to refuse to enforce the contract . . . . The court does not sit to enforce illegal contracts. There is no question of estoppel; it is for the protection of the public that the court refuses to enforce such a contract".

The other ground of appeal is that section 27 did not apply in this case. It was submitted that P.1 was not given or taken as security but had been executed merely as a note or memorandum required under section 16. I cannot find any substance in this ground of appeal. The claim was for the amount due on the promissory note (P.1) and it is clear from the evidence produced at the hearing that P.1 was intended to be and in fact given and taken as security for the loan.

Section 16(4) reads as follows:—

"Where a promissory note in the English language or in Romanised Malay given by a borrower to a moneylender in respect of a loan contains in the body of the note or by writing thereon all the terms of the contract and is countersigned by the lender or his agent such promissory note shall in itself be sufficient note or memorandum of the contract for the purpose of this section".

In my view all that this section provides is that when a promissory note contains all the terms of the contract required under section 16(3) and is counter-signed by the lender or his agent it shall in itself be a sufficient note or memorandum for the purposes of section 16. A promissory note taken as security, though it may also be a sufficient note or memorandum for the purposes of section 16, as in this case P.1 is, must still comply with the requirement of section 27(1).

I therefore dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *K.L. Devaser & Co.; Norendra & Yap.*

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK v. THE SAINT CHRISTOPHER (OWNERS); THE SAINT CHRISTOPHER

[O.C.J. (Tan Ah Tah F.J.) October 24, 1968]

[Singapore — *In rem* Admiralty Suit No. 20 of 1968]

Practice and Procedure — Admiralty — Arrest of ship — Sale by auction — Sheriff's commission — Scale of — R.S.C. 1934, Schedule B, item 115.

Shipping — Warrant of arrest executed against ship — Ship subsequently sold by Sheriff — Whether Sheriff entitled to commission under R.S.C. 1934, Schedule B, item 115 — Analogy — Admiralty Procedure Rules, rr. 5 and 27.

This matter arose out of an action brought by the plaintiffs who claimed to be the mortgagees of the vessel *The Saint Christopher* against the owners of and other persons interested in the said vessel. On the application of the plaintiffs the vessel was arrested by the Sheriff and subsequently sold by public auction. The question arose as to the basis on which the Sheriff's commission in connection with the sale of the vessel should be charged.

Held: the proceedings taken by the Sheriff in the present case are analogous to proceedings when a writ of seizure and sale is executed by the Sheriff within the ordinary jurisdiction of the court and therefore the Sheriff's commission should be charged in accord-